2017

Bank of America, N.A., Plaintiff-Appellant, v. Loraine Sundquist and John Doe/Jane Doe/Occupant Doug Kahler, an Individual, Defendants-Appellees.

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

BANK OF AMERICA, N.A., Plaintiff-Appellant, v. LORAINE SUNDQUIST and JOHN DOE/JANE DOE/OCCUPANT DOUG KAHLER, an individual, Defendants-Appellees.	Case No. 20170014

On Appeal from the Third District Court, Salt Lake County
Case No. 110408730 EV (Judge Bruce C. Lubeck)

OPENING BRIEF FOR BANK OF AMERICA

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May 25, 2017

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PARTIES TO THE PROCEEDINGS

The Federal National Mortgage Association (FNMA) originally filed this action against Loraine Sundquist and a second unknown defendant, listed as John/Jane Doe. That defendant has never been identified, nor participated in this litigation in any way.

Prior to the filing of this appeal, Bank of America was substituted for FNMA as plaintiff.

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JURISDICTION

The district court entered judgment and quieted title in favor of defendant Loraine Sundquist on December 21, 2016. R.2294-2297. Two days later, plaintiff Bank of America appealed to the Utah Supreme Court, which had jurisdiction under Utah Code § 78A-3-102(3)(j). R.2301-2303. That court transferred the appeal to this Court on January 6, 2017. R.2308-2309. This Court has jurisdiction under Utah Code § 78A-4-103(2)(j).

ISSUES PRESENTED

1. Whether 12 U.S.C. § 92a and 12 C.F.R. § 9.7 permitted ReconTrust Company, N.A.—a national bank authorized to act as a trustee by the Office of the Comptroller of the Currency (OCC)—to conduct a foreclosure sale of property in Utah because under federal law ReconTrust was located in Texas and Texas law permitted it to conduct such a sale.

2. Whether, even if ReconTrust is located in Utah under federal law, it was authorized by federal law to conduct a foreclosure sale of property in Utah, because Utah permits such sales by entities that compete with national banks.

These are both questions of law and hence reviewed de novo. *State v. Rio Vista Oil, Ltd.*, 786 P.2d 1343, 1347 (Utah 1990). The issues were raised in an eviction-hearing brief shortly after the case was filed. R.38-39. They were also decided by the Utah Supreme Court in an interlocutory appeal taken earlier in this

litigation—a decision that, Bank of America acknowledges, requires affirmance here by this Court. R.1082. Following the Utah Supreme Court's decision, the district court entered a consent judgment, which "expressly reserve[d]" Bank of America's "right to appeal ..., including the question of whether 12 U.S.C. § 92a and related regulations preempt Utah law and permit ReconTrust ... to exercise the power of sale for properties located in Utah." R.2295.

STATUTES AND REGULATION INVOLVED

Per Utah Rule of Appellate Procedure 24(a)(11), relevant portions of 12 U.S.C. §92a, 12 C.F.R. § 9.7, and Utah Code §§ 57-1-21 and -23 are reproduced in the addendum to this brief.

STATEMENT OF THE CASE

A. Nature Of The Case, Course Of Proceedings, And Disposition Below

This is an appeal from a final judgment in favor of defendant Loraine Sundquist. In 2009, Sundquist defaulted on a loan secured by a deed of trust attached to real property in Utah. R.3. ReconTrust—a national bank and the successor trustee on the trust deed—noticed and conducted a non-judicial foreclosure sale of the property; the purchaser was the Federal National Mortgage Association (FNMA), also known as Fannie Mae. R.331-333, 335-336. FNMA then initiated this unlawful-detainer action after Sundquist refused to vacate the

property. Sundquist responded by filing numerous counterclaims, including a claim to quiet title in herself. R.1280-1286.

After a hearing, the district court awarded possession of the property to FNMA pending the outcome of the litigation and ordered Sundquist to vacate. R.123. Sundquist filed an interlocutory appeal, challenging ReconTrust's authority to conduct the foreclosure sale. The Utah Supreme Court held that ReconTrust was not authorized to conduct the sale under Utah law, and that federal law did not preempt Utah law and authorize that conduct. R.1066-1084.

On remand, the district court substituted Bank of America as plaintiff after FNMA executed a quitclaim deed for the subject property in favor of the bank. R.2267-2269. In light of the Utah Supreme Court's decision in the interlocutory appeal, the parties stipulated to a consent judgment in favor of Sundquist on the unlawful-detainer claim, and an order quieting title in Sundquist. R.2262-2265. The judgment and order, which the district court entered on December 21, 2016, expressly reserved Bank of America's right to appeal, including on whether federal law authorized ReconTrust to conduct the foreclosure sale. R.2281.

B. Statutory Background

1. Federal banking law

a. Federal law authorizes national banks to make loans secured by real estate, 12 U.S.C. § 371; to acquire real property through foreclosure; and to hold,

manage, and convey such property, *see id.* § 29 (Second), (Third). *See generally* OCC Interpretive Letter No. 646, 1994 WL 271179, at *2 (Apr. 12, 1994) ("Lending includes not only the initial extension of credit but also collecting payments, foreclosing on collateral if the debtor defaults, and managing ... assets."). As an adjunct to these authorized activities, national banks regularly serve as trustees on deeds of trust securing real property.

Federal law explicitly authorizes that activity as well. Specifically, 12 U.S.C. § 92a prescribes the "[t]rust powers" of national banks. The statute authorizes the Comptroller of the Currency to grant to national banks "the right to act as trustee ... or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a). The Comptroller may only grant such powers, however, "when not in contravention of State or local law." *Id.*[1]

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[1] Earlier in this litigation, the U.S. Solicitor General filed a brief that explained the statutory history:

> Section 92a was originally enacted in 1913 as part of the Federal Reserve Act, ch. 6, § 11(k), 38 Stat. 262. In 1962, Congress removed Section 92a from th[at] ... Act and transferred authority from the Board of Governors of the Federal Reserve System to the OCC. See Act of Sept. 28, 1962, Pub. L. No. 87-722, 76 Stat. 668. Although the provision was codified at 12 U.S.C. 92a, the 1962 statutory revision did not purport to amend the National Bank Act or place the provision

The provision immediately after section 92a(a) clarifies this "not in contravention" phrase. It specifies that if a state authorizes the exercise of fiduciary powers "by State banks, trust companies, or other corporations which compete with national banks," then "the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law." 12 U.S.C. § 92a(b).

Federal law thus prevents states from discriminating against national banks in favor of state banks, trust companies, or other competitors, by authorizing national banks to perform any fiduciary duties that state law permits those competitors to perform and preempting contrary state law. The statute also gives the Comptroller the authority to "promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein." 12 U.S.C. § 92a(j); *see also id.* § 93a ("[T]he Comptroller of the Currency is authorized to prescribe rules and regulations to carry out the responsibilities of the office.").

As the federal banking regime contemplates, national banks frequently undertake their lending and fiduciary duties across state lines. The Comptroller

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therein. The provision is nevertheless commonly referred to as being part of National Bank Act, a convention followed in this brief.

U.S. Amicus Br. 2-3 n.1, *Federal Nat'l Mortg. Ass'n v. Sundquist*, No. 13-852 (U.S. Oct. 7, 2014) (citation omitted). This brief follows the convention as well.

thus promulgated a regulation governing "[m]ulti-state fiduciary operations." 12 C.F.R. § 9.7. It confirms the authority of national banks to "act in a fiduciary capacity in any state," and more specifically to serve in any fiduciary capacity that a "state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state." *Id.* § 9.7(a). The regulation also authorizes national banks, "[w]hile acting in a fiduciary capacity in one state," to market fiduciary services and act as a fiduciary for customers in other states—including "act[ing] as fiduciary for relationships that include property located in other states." *Id.* § 9.7(b).

b. Although section 92a(a) permits the Comptroller to authorize a national bank to act as a fiduciary "when not in contravention of State or local law," the statute does not state clearly *which* state's law must permit such fiduciary conduct. The Comptroller's regulation fills this gap, providing that "[f]or each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship." 12 C.F.R. § 9.7(d). The regulation then elaborates that "[a] national bank acts in a fiduciary capacity in the state in which it [1] accepts the fiduciary appointment, [2] executes the documents that create the fiduciary relationship, and [3] makes discretionary decisions regarding the investment or distribution of fiduciary assets." *Id.* The Comptroller made these three "key" fiduciary functions the dispositive factors in order to

"provide clarity and certainty for national banks' multi-state fiduciary activities." *Fiduciary Activities of National Banks*, 66 Fed. Reg. 34,792, 34,792 (July 2, 2001).[2]

For purposes of authority to conduct the relevant activities, the Comptroller's regulation expressly preempts the law of states other than the one in which the national bank is located, providing that "[e]xcept for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks." 12 C.F.R. § 9.7(e)(2). Hence, if the Comptroller authorizes a national bank to act as a fiduciary, and the state in which the national bank is located—determined by the place where three core fiduciary acts occur—permits such conduct for state banks or other corporations that compete with national banks, then federal law permits the national bank to conduct those fiduciary activities nationwide, notwithstanding the law of any other state. National banks, however, are still subject to other states' laws that concern issues other than a bank's authority to engage in the fiduciary activity—for example, "state substantive laws that govern the fiduciary relationship." *Fiduciary Activities of National Banks*, 66 Fed. Reg. at 34,796.

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[2] Although not the situation here, if a national bank carries out these three key activities in more than one state, then under the Comptroller's regulation, "the state in which the bank acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states." 12 C.F.R. § 9.7(d).

Finally, section 92a and the Comptroller's regulation govern fiduciary activities beyond real estate trusteeships, such as a national bank's "right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, [or] receiver," 12 U.S.C. § 92a(a). National banks thus rely on section 92a—and the OCC's interpretation of it—when they undertake a broad range of trust activities.[3]

2. Utah's trust deed statute

Utah enacted its Trust Deed Act, *see* Utah Code Ann. §§ 57-1-19 to -36, in 1961. Under that act, a trust deed "convey[s] real property to a trustee ... to secure the performance of an obligation of the trustor or other person named in the deed to a beneficiary." *Id.* § 57-1-19(3). A trustee's obligations under such a deed include foreclosing on and selling the property if the borrower defaults. *Id.* § 57-1-23.

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[3] *See, e.g.*, OCC Interpretive Letter 1106, 2008 WL 7137071, at *3 (Oct. 10, 2008) (applying section 92a and the regulation to a national bank's service as "personal representative for the estate of a person" domiciled in a state that purported to impose residency restrictions for executors); OCC Interpretive Letter 973, 2003 WL 23675954 (Aug. 12, 2003) (national bank's service as indenture trustee on municipal bonds); OCC Interpretive Letter 872, 1999 WL 1251391, at *1 (Oct. 28, 1999) (national bank's plan to offer "a full range of trust services" in California while conducting the "core functions that are essential to the creation and administration of the fiduciary relationship" in other states); OCC Interpretive Letter 866, 1999 WL 983923, at *1 (Oct. 8, 1999) (national bank's retail-trust business, which would establish "a retail brokerage account that holds cash, securities and similar financial products and ... provide[] a variety of trust services to assist in meeting a customer's estate, investment, and tax planning goals").

Utah's statute authorizes a number of persons or entities to act as trustee of a trust deed, including active members of the Utah State bar, depository institutions or insurance companies, corporations authorized to conduct trust business in Utah, title insurance companies with an office in Utah, federal agencies, and associations or corporations licensed by the Farm Credit Administration. Utah Code Ann. § 57-1-21(1)(a). Until 2001, any person or entity permitted to act as a trustee under the Utah Trust Deed Act could exercise the power of sale. That year, however, the Utah legislature limited the power to certain trustees. *See* 2001 Utah Laws 1074, ch. 236, § 2 (eff. Apr. 30, 2001). In particular, the power of sale may now be exercised only by:

- an "active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee" or
- a "title insurance company or agency that ... holds a certificate of authority or license ... to conduct insurance business in the state; ... is actually doing business in the state; and ... maintains a bona fide office in the state."

Utah Code Ann. § 57-1-21(1)(a)(i), (iv); *see also id.* § 57-1-21(3).

C. Prior Proceedings

1. In 2006, Loraine Sundquist executed a deed of trust as security for a loan on her home in Draper, Utah. R.314-326. The deed named Mortgage Electronic Registration Systems, Inc. (as nominee for America's Wholesale Lender) as beneficiary. R.314-315.

Sundquist stopped making payments on the loan in 2009. At that time, Mortgage Electronic Registration Systems appointed ReconTrust Company, a national bank chartered by the Comptroller and a wholly owned subsidiary of Bank of America, as the successor trustee. R.328-329. The substitution of trustee was executed and notarized in Texas. R.328. To document Sundquist's default, ReconTrust promptly recorded a notice of default and election to sell against the property—also executed in Texas. R.331-333.

The beneficial interests under the trust deed were subsequently assigned to FNMA. R.335-336. Around the same time, ReconTrust initiated a non-judicial foreclosure. FNMA was the prevailing bidder (by credit bid) at the trustee's sale, so it received a trustee's deed conveying the property to it. R.338-340. Sundquist continued to live in the house after the foreclosure sale, however, despite receiving a notice to quit. R.11-18.

2. In 2012, FNMA filed this unlawful-detainer action against Sundquist in the Third Judicial District Court. R.1-18. Sundquist counterclaimed for abuse of judicial process, quiet title, wrongful lien, trespass, wrongful foreclosure, and declaratory judgment. R.1276-1288.

The district court scheduled an eviction hearing under Utah Code § 78B-6-810(2). R.26-27. In her pre-hearing brief, Sundquist contended that ReconTrust had wrongfully exercised the power of sale because it was neither a member of the

Utah State Bar nor a title insurance company with an office in Utah, and therefore was not authorized under the Trust Deed Act to conduct the sale. R.67. FNMA argued in response that ReconTrust, as a national bank, was authorized to conduct the sale under the National Bank Act (NBA), which preempts the Utah statute. R.120-121. Without specifically addressing this preemption argument, the trial court awarded FNMA possession of the property during the pendency of the litigation. R.123.

3.a. The Utah Supreme Court granted Sundquist's petition for interlocutory review and reversed the eviction order. R.1066-1084 (*Federal Nat'l Mortg. Ass'n v. Sundquist*, 2013 UT 45, 311 P.3d 1004). The court did not dispute FNMA's contention that under the Comptroller's regulation, ReconTrust was "located" in Texas "because the substitution of trustee, notice of default, and trustee's deed all were executed and notarized in Texas." *Sundquist*, 2013 UT 45, ¶ 16. Nor did the court disagree that ReconTrust had authority under Texas law to conduct the non-judicial foreclosure sale. *Id.* ¶ 13 (citing Tex. Fin. Code §§ 32.001, 182.001). The court nevertheless held that ReconTrust was barred from exercising the power of sale as to Sundquist's property because, on the court's reading of section 92a (as opposed to the regulation), ReconTrust was "located" in Utah when it conducted the sale and therefore had to follow Utah law in exercising its national-bank trustee authority. *Id.* ¶ 3.

Recognizing that its decision was governed by *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Utah Supreme Court first addressed whether the critical phrase in section 92a(a)—"the laws of the State in which the national bank is located"—is ambiguous. *Sundquist*, 2013 UT 45, ¶¶ 21-29. Relying on an on-line dictionary definition of "locate" ("to determine or indicate the place, site, or limits of" something, *id.* ¶ 23), as well as on a senator's statement about a different provision of banking law, the court concluded that the term "located" in section 92a "is clear. A national bank is located ... where it acts or conducts business. And it certainly acts as a trustee in the state in which it liquidates trust assets." *Id.* ¶ 25.

The court also sought support for its reading by invoking two "substantive canons of statutory construction." *Sundquist*, 2013 UT 45, ¶ 30. *First*, the court cited a canon requiring a clear statement from Congress of its intent to intrude in an area of traditional state prerogative—here, disposition of real property. *Id.* ¶¶ 31-32. *Second*, the court invoked an administrative-law canon that "deem[s] it highly unlikely that Congress would leave the determination of major policy questions to agency discretion, and thus require[s] a clear statement of congressional intent to do so." *Id.* ¶¶ 33-35. Seeing no clear statement to satisfy either of these canons, the court concluded that Congress's decision to expressly authorize the Comptroller to grant national banks "the right to act as trustee ... or

in any other fiduciary capacity ... under the laws of the State in which the national bank is located," 12 U.S.C. § 92a(a), did not entail any delegation of authority to construe the statutorily undefined term "located." *Sundquist*, 2013 UT 45, ¶¶ 36-38.

Although its holding that the statutory term "located" is unambiguous sufficed to resolve the appeal, the Utah Supreme Court conducted a *Chevron* step-two analysis, and concluded that the Comptroller's regulation interpreting section 92a "is unreasonable—if not irrational—and therefore does not deserve deference." *Sundquist*, 2013 UT 45, ¶ 39 (quotation marks omitted). More specifically, the court took issue with the three core fiduciary activities that, under the regulation, determine where a national bank is "located." It saw "nothing in the statute itself that ascribes any particular significance [to] these three particular acts." *Id.* ¶ 42. And in the court's view, the regulation was unreasonable because "missing from this list" of relevant fiduciary activities is "where the bank engages in an act which liquidates the trust assets, *e.g.*, engaging in a nonjudicial foreclosure of real property where the trust asset is located." *Id.* (quotation marks omitted).

The Utah Supreme Court next addressed FNMA's alternative argument that even if ReconTrust was "located" in Utah when it exercised its fiduciary duties, section 92a(b) authorized ReconTrust to conduct the challenged sale. *Sundquist*,

2013 UT 45, ¶¶ 47-49. As noted, under that subsection, when a state permits the exercise of fiduciary powers "by State banks, trust companies, or other corporations which compete with national banks, ... the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section." 12 U.S.C. § 92a(b). The court stated, however, that, "[a]s a national bank, ReconTrust competes with Utah banks. It is not subject to competition from either members of the Utah State Bar or Utah title insurance companies." *Sundquist*, 2013 UT 45, ¶ 48. Accordingly, the court held, the Utah Trust Deed Act's grant of power to Utah title insurance companies to conduct foreclosure sales does not, under section 92a(b), confer that same power on national banks. *Id.* ¶ 49.

b. Justice Lee concurred in part and in the judgment. While embracing the majority's conclusion that Utah law governed ReconTrust's authority to sell real property located in Utah, Justice Lee disagreed with the majority's conclusion that the statutory phrase "laws of the State in which the national bank is located" is clear. *Sundquist*, 2013 UT 45, ¶¶ 54, 56 (concurring opinion). To the contrary, he observed, the U.S. Supreme Court has held that "the term 'located' as it appears in the National Bank Act, has no fixed, plain meaning." *Id.* ¶ 56 (citing *Wachovia Bank v. Schmidt*, 546 U.S. 303, 313 (2006)). Justice Lee also offered a number of other "grammatically tenable" and "linguistically possible" definitions for

"located." *Id.* ¶¶ 57-58, 60. He further disagreed with the majority's reliance on the legislative history of "an unrelated section of the NBA," explaining that because "'located' takes on different meanings throughout the NBA, it is by no means clear that legislative history concerning the use of the term in one section has any relevance to its use in another." *Id.* ¶ 59 (citation omitted). He nonetheless concurred in the judgment on the basis of the "clear statement rules" that the majority invoked. *Id.* ¶ 61.

4. FNMA petitioned the U.S. Supreme Court for a writ of certiorari. After receiving Sundquist's opposition and FNMA's reply brief, the Court invited the Solicitor General to file a brief expressing the views of the United States. In his brief, the Solicitor General stated not only that the Utah Supreme Court's decision was wrong and in conflict with U.S. Supreme Court precedent, but also that the issue was important enough to warrant certiorari because of its potential to harm the national banking industry. U.S. Amicus Br. 12-20, 22, *Federal Nat'l Mortg. Ass'n v. Sundquist*, No. 13-852 (U.S. Oct. 7, 2014) (hereafter U.S. *Sundquist* Br.). He nonetheless recommended denying FNMA's petition because, he argued, the interlocutory posture of the case made it unclear whether the U.S. Supreme Court had jurisdiction. *Id.* at 8-9. The Court denied certiorari in late 2014. *Federal Nat'l Mortg. Ass'n v. Sundquist*, 135 S. Ct. 475 (2014).

5. Following the remand, FNMA executed a quitclaim deed of the subject property in favor of Bank of America, R.2267-2269, and the parties successfully moved the district court to substitute the bank for FNMA under Utah Rule of Civil Procedure 25(c), R.2262-2263. The parties also stipulated to entry of judgment and an order dismissing all of Sundquist's counterclaims, entering judgment in favor of Sundquist on the unlawful-detainer claim "in light of" the Utah Supreme Court's decision in the interlocutory appeal, and quieting title in Sundquist against the trustee's deed issued to FNMA. R.2262-2263. The court entered the proposed consent judgment the same day. R.2294-2297.

The consent judgment expressly "reserves [Bank of America's] right to appeal from this Judgment and Order, including the question of whether 12 U.S.C. § 92a and related regulations preempt Utah law and permit ReconTrust Company, N.A. to exercise the power of sale for properties located in Utah." R.2295. Bank of America noticed this appeal two days later.

SUMMARY OF ARGUMENT

As a national bank that had received the requisite authority from the Comptroller of the Currency, ReconTrust was authorized under federal law to act as a trustee and to conduct the foreclosure sale of Sundquist's property. Any Utah law to the contrary was preempted. Although the Utah Supreme Court reached a

contrary conclusion earlier in this litigation—which requires this Court to affirm—Bank of America presents its arguments here to preserve them for further review.

I.A. The National Bank Act authorizes the Comptroller to permit national banks "to act as trustee" or in other fiduciary capacities "when not in contravention of State or local law." 12 U.S.C. § 92a(a). The Comptroller's regulations clarify that a national bank's ability to act as a fiduciary is limited by the law of the state where the national bank "[1] accepts the fiduciary appointment, [2] executes the documents that create the fiduciary relationship, and [3] makes discretionary decisions regarding ... fiduciary assets." 12 C.F.R. § 9.7(d). Under this regulation, ReconTrust was located in Texas when it acted as trustee of the trust deed to Sundquist's property. And Texas law does not prohibit state banks or trust companies from conducting foreclosure sales. Accordingly, ReconTrust had the power to conduct such sales under section 92a. The law of any other state, including Utah, is inapplicable. *Id.* § 9.7(e).

B. The Utah Supreme Court erred in holding that ReconTrust was subject to the restrictions of Utah law. The court should have honored the Comptroller's regulation because it constitutes a reasonable construction of an ambiguous statute.

1. Title 12 U.S.C. § 92a is ambiguous regarding which state's law limits a national bank's powers as a fiduciary. In particular, it says that a national bank cannot act in contravention of the law of the state in which the bank is "located,"

but does not indicate where a bank is "located" for these purposes. The Utah Supreme Court held that under the statute a national bank is "located in those places where it acts or conducts business." *Sundquist*, 2013 UT 45, ¶¶ 23, 25. But that interpretation does not render section 92a unambiguous because nothing in the statute indicates which activities are the relevant ones when a national bank "acts or conducts business" (*id.*) in multiple states. Lastly, two canons of statutory interpretation relied upon by the Utah Supreme Court do not render the statute unambiguous, either.

2. The Comptroller's regulation is a reasonable construction of section 92a. That regulation defines where a national bank is "located" based on three activities that are applicable regardless of the type of fiduciary relationship, thus establishing a clear and consistent rule for determining which state's law governs the bank's activities. The Utah Supreme Court's interpretation of section 92a, in contrast, would make a national bank's "location" turn on the object of the specific fiduciary activity, and could mean that a bank is located in multiple states even when acting in a single fiduciary capacity. Because the Comptroller's regulation reasonably promotes clarity and consistency for national banks, and does not conflict with any language in section 92a, the Utah Supreme Court erred in refusing to apply that regulation.

II. Even if ReconTrust were located in Utah under section 92a(a), federal law still permitted it to conduct the foreclosure sale of Sundquist's property. Under 12 U.S.C. § 92a(b), if state law permits "[s]tate banks, trust companies, or other corporations which compete with national banks" to exercise fiduciary duties, then "the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law." Utah law permits title insurance companies to conduct non-judicial foreclosure sales, and title-insurance companies compete with national banks for business as trustees in providing foreclosure sale services. Accordingly, section 92a permits national banks to conduct foreclosure sales.

ARGUMENT

Federal law permitted ReconTrust to act as a trustee and conduct the foreclosure sale of Sundquist's property—and it preempted anything in Utah law to the contrary. Under section 92a and the Comptroller's regulation, ReconTrust was "located" in Texas for purposes of its role as trustee regarding Sundquist's property; it was therefore restricted only by the limitations that Texas law places on fiduciaries. Because Texas law allows state banks and trust companies to act as trustees and to conduct foreclosure sales, ReconTrust was permitted by federal law to conduct such a sale in any state. Finally, even if ReconTrust were located in Utah, federal law would still permit it to conduct the foreclosure sale because Utah

law permits competitors of national banks (specifically, title insurance companies) to conduct such sales.

As explained, the Utah Supreme Court has already confronted these issues in this case, and decided them in Sundquist's favor. Bank of America of course maintains that that decision was erroneous, but it recognizes that this Court is bound by *Sundquist* and therefore required to affirm the judgment below. Bank of America thus presents its arguments here to preserve the issues for further appellate review.

I. FEDERAL LAW AUTHORIZED RECONTRUST TO CONDUCT THE FORECLOSURE SALE IN UTAH BECAUSE SUCH CONDUCT IS NOT PROHIBITED BY THE LAW OF THE STATE WHERE RECONTRUST WAS LOCATED

The Utah Supreme Court held earlier in this litigation that Utah law barred ReconTrust from conducting the non-judicial foreclosure of the property at issue in this case. But ReconTrust is a federally chartered national banking association governed by the NBA. Its fiduciary activity was therefore subject only to the law of the state in which ReconTrust was "located." 12 U.S.C. § 92a(a). Under the Comptroller's regulation interpreting section 92a, that state was Texas. *See* 12 C.F.R. § 9.7(d). And because Texas law permitted ReconTrust to conduct foreclosure sales, ReconTrust could exercise that power throughout the country, regardless of the law of the state where the trust property was located.

The Utah Supreme Court reached a contrary conclusion by deeming the word "located" in § 92a(a) unambiguous, and by dismissing the Comptroller's regulation as unreasonable. Those rulings were deeply flawed, and although law-of-the-case doctrine allows a court not to reconsider matters it resolved in a prior ruling in the same case, *see Thurston v. Box Elder County*, 892 P.2d 1034, 1038-1039 (Utah 1995), a court may revisit an issue "when the court is convinced that its prior decision was clearly erroneous and would work a manifest injustice," *id.* at 1039. For reasons explained below, that standard is met here. Indeed, that the court erred is confirmed by the Tenth Circuit's intervening decision in *Dutcher v. Matheson*, 840 F.3d 1183 (10th Cir. 2016), which held—in direct conflict with *Sundquist*—that 12 U.S.C. § 92a does not unambiguously require the application of Utah law, *see* 840 F.3d at 1199-1202; *see also Garrett v. ReconTrust Co., N.A.*, 546 F. App'x 736, 738 (10th Cir. 2013).

A. Under The Comptroller's Regulation, ReconTrust Was "Located" In Texas, Which Allowed ReconTrust's Conduct

As the U.S. Supreme Court explained long ago, "[n]ational banks are instrumentalities of the federal government," *Davis v. Elmira Sav. Bank*, 161 U.S. 275, 283 (1896), and possess the powers granted to them by federal law. One of the powers that Congress has authorized the Comptroller to grant national banks is "to act as trustee ... or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks

are permitted to act under the laws of the State in which the national bank is located." 12 U.S.C. § 92a(a). The Comptroller granted this power to ReconTrust, and hence it was permitted to "act as trustee" or in "any other fiduciary capacity"—albeit only when doing so was "not in contravention of State or local law." *Id.*[4]

After full notice-and-comment rulemaking, the Comptroller promulgated a regulation clarifying *which* state's laws govern a national bank's ability to act as a trustee or other fiduciary, i.e., which state is referred to in section 92a's "not in contravention" clause. This regulation provides that:

> [T]he state referred to in section 92a is the state in which the bank acts in a fiduciary capacity.... A national bank acts in a fiduciary capacity in the state in which it [1] accepts the fiduciary appointment, [2] executes the documents that create the fiduciary relationship, and [3] makes discretionary decisions regarding the investment or distribution of fiduciary assets.

12 C.F.R. § 9.7(d); *accord id.* § 9.7(e)(1).

Under this standard, ReconTrust "act[ed] in a fiduciary capacity" in Texas in conducting the foreclosure sale challenged in this case, because that is where it: (1) accepted the fiduciary appointment to serve as successor trustee on the deed of

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[4] The fiduciary powers granted under section 92a include the power acting as a trustee on a deed of trust and conducting trustee sales. *See* OCC Interpretive Letter, 1986 WL 143993, at *1-2 (June 13, 1986) ("act[ing] as trustee under deeds of trust in favor of [a] Bank as beneficiary" and "conduct[ing] trustee sales" are "permissible for a national bank as an aspect of trust powers granted by 12 U.S.C. § 92a").

trust, (2) executed the documents creating the fiduciary relationship, and (3) made discretionary decisions regarding the fiduciary assets. *See* R.328-329 (substitution of trustee executed and notarized in Texas); R.331-333 (notice of default and election-to-sell document executed and notarized in Texas); R.338-340 (trustee's deed executed and notarized in Texas). And because ReconTrust was acting as a fiduciary in Texas, its actions in that capacity were restricted only by Texas law—not by any limitations that Utah law imposes on fiduciaries' authority. That is because the Comptroller's regulation provides, as noted, that "[e]xcept for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks." 12 C.F.R. § 9.7(e)(2).

The fact that Texas was the only state whose law governed ReconTrust's challenged conduct establishes that that conduct was lawful, because Texas law permits state banks and trust companies to act as trustees and conduct foreclosure sales. *See* Tex. Fin. Code Ann. § 32.001(b) ("state bank[s] may ... act in a fiduciary capacity ... as ... trustee[s]"); *id.* § 182.001(b) (same for state trust companies); Tex. Prop. Code Ann. § 51.0001(8) (defining "trustee" as "a person or persons authorized to exercise the power of sale under ... a security instrument"); *id.* § 51.0074(a) (authorizing trustees "to exercise the power of sale under a security instrument"). Because Texas law does not prohibit state banks or trust

companies from conducting foreclosure sale, section 92a(a) vested ReconTrust with the power to do the same. And ReconTrust could exercise that power nationwide, because doing so would not be "in contravention of State or local law ... of the State in which the national bank is located," i.e., the law of Texas. 12 U.S.C. § 92a(a); *see also* 12 C.F.R. § 9.7(b) ("While acting in a fiduciary capacity in one state, a national bank may ... act as fiduciary for[] customers located in any state," including in "relationships that include property located in other states."). As the Comptroller put it in an interpretive letter, "[o]nce the state in which a national bank is acting in a fiduciary capacity is identified, the fiduciary services may be offered regardless of where the fiduciary customers reside or where property that is being administered is located." OCC Interpretive Letter No. 1103, 2008 WL 7137068, at *2 (Sept. 18, 2008) (footnote omitted).

B. The Utah Supreme Court Erred In Holding That Federal Law Did Not Authorize ReconTrust To Conduct The Challenged Foreclosure Sale

In its earlier ruling in this case, the Utah Supreme Court rejected the foregoing analysis, holding instead that ReconTrust's conduct of the challenged sale was unlawful because Utah law governed rather than Texas law. In reaching that conclusion, the court misapplied both steps of the *Chevron* framework.

Under that framework, courts evaluating an agency's construction of a statute first consider "whether Congress has directly spoken to the precise question

at issue" in the statute itself. *Chevron*, 467 U.S. at 842. "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-843. But "if the statute is silent or ambiguous with respect to the specific issue," then courts proceed to the second step of the *Chevron* analysis: determining "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843.

Here, the Utah Supreme Court should have concluded at *Chevron* step one that section 92a is ambiguous, and at *Chevron* step two that the Comptroller's regulation is a reasonable interpretation of the statute and therefore lawful.

1. Section 92a is ambiguous as to which state's law applies to a national bank's fiduciary acts

Although Congress provided that national banks may act in a fiduciary capacity "when not in contravention of State or local law," 12 U.S.C. § 92a(a), it did not specify *which* state's law governs. As the Tenth Circuit explained, "the statute simply does not provide any indication of where a bank is 'located' in situations like this one, where a bank operates out of one state but conducts foreclosures in another." *Dutcher*, 840 F.3d at 1199; *see also Garrett*, 546 F. App'x at 738.

The Utah Supreme Court disagreed in its interlocutory ruling in this case, concluding that the term "located" in section 92(a) is unambiguous. That is incorrect.

a. As an initial matter, the U.S. Supreme Court has repeatedly recognized—specifically in the context of the NBA—that "[t]here is no enduring rigidity about the word 'located.'" *Citizens & Southern Nat'l Bank v. Bougas*, 434 U.S. 35, 44 (1977). Indeed, the Court elaborated more recently, "the term 'located,' as it appears in the National Bank Act, has no fixed, plain meaning." *Wachovia*, 546 U.S. at 313. Instead, "its meaning depends on the context in and purpose for which it is used." *Id.* at 318. For example, the Court explained in *Wachovia*, "[i]n some [NBA] provisions, the word unquestionably refers to a single place: the site of the banking association's designated main office. In other provisions, 'located' apparently refers to or includes branch offices." *Id.* at 313 (citations omitted).

Even if it were true that "locate" had a clear meaning in this context, the meaning the Utah Supreme Court adopted does not warrant its conclusion that ReconTrust was "located" in Utah for purposes of the challenged foreclosure sale. Relying on a dictionary definition of "locate," the court asserted that "[a] national bank is located in those places where it acts or conducts business." *Sundquist*, 2013 UT 45, ¶¶ 23, 25. Whatever the merits of that assertion, the court leaped from it to the conclusion that a national bank "acts or conducts business" "in the state in which it liquidates trust assets." *Id.* ¶ 25. That leap is unjustified. As the Tenth Circuit stated, "nothing in the statute ... indicates *what* activities are the

relevant ones." *Dutcher*, 840 F.3d at 1201; *accord* U.S. *Sundquist* Br. 17. Nothing, that is, indicates whether the pertinent conduct is the liquidation of trust assets (as *Sundquist* held) or rather the conduct identified in the Comptroller's regulation. *See Sundquist*, 2013 UT 45, ¶ 58 (Lee, J., concurring opinion in part and concurring in the judgment) ("The key question ... is *what* 'determines' ... a person['s] or entity's location. And that question is not at all answered—certainly not clearly or unambiguously—by the statutory text."). "On this barren statutory terrain," the Tenth Circuit explained in *Dutcher*, "one might just as well build a case that the relevant activities are the ones that the [Comptroller] identifies in 12 [C.F.R.] § 9.7(d), such as, executing documents that create the fiduciary relationship or making discretionary decisions regarding the distribution of fiduciary assets." 840 F.3d at 1201.

The legislative history that *Sundquist* cited does not support the court's ruling. The court relied on one senator's statement about section 11(k) of the Federal Reserve Act of 1913, which "allowed conversion of state banks to national banks '[p]rovided ... [t]hat said conversion shall *not be in contravention of the State law*.'" *Sundquist*, 2013 UT 45, ¶ 27 (emphasis added) (quoting Federal Reserve Act of 1913, ch. 6, §§ 8, 11(k), 38 Stat. 258, 262 (1913)). This language, the court explained, was "put ... in to show that there was no purpose on the part of Congress to disregard the local State law, but merely to give its assent provided

the State law permitted it to be done." *Id.* Because Congress used similar language in what later became section 92a, the court concluded "that Congress intended to preclude any inference that a national bank may disregard local State law in performing its duties as trustee." *Id.* ¶ 28.

Even setting aside the fact that individual members' statements are entitled to minimal weight in statutory interpretation, *see, e.g.*, *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 457 n.15 (2002), the flaw in this reasoning is that the legislative history—like section 92a itself—does not address the critical issue, namely which "State law" Congress was contemplating. Justice Lee recognized this, stating in his concurring opinion that "the cited legislative history does not answer the key question: Local to what? To the bank's physical location, or to the fiduciary acts it performs?" *Sundquist*, 2013 UT 45, ¶ 59. Put another way, while the evident intent in the legislative history (as in section 92a itself) was to respect "State law," the statute limits that respect to "the State in which the national bank is located." 12 U.S.C. § 92a(a). To say that Congress wanted to respect state law—which is all the legislative history does—thus does nothing to answer the question of which state law is at issue, i.e., where the bank is "located." *See Garrett*, 546 F. App'x at 739 (noting that even if Congress intended to put national banks on an equal basis with state banks, "that principle would most reasonably be tied to the 'State' in

which the national bank is 'located,' leading to the same ambiguity as an isolated textual analysis of Section 92a").

In short, the Utah Supreme Court's conclusion that "located" in section 92a is unambiguous directly conflicts with U.S. Supreme Court precedent, and is not saved by the legislative history the Utah Supreme Court cited.

b. The Utah Supreme Court also attempted to bolster its reading of "located" by invoking two related clear-statement canons. Neither applies here.

The court first pointed to the canon that a clear statement of congressional intent is required to "alter the usual constitutional balance between the States and the Federal government, or intrude on a field of traditional state sovereignty." *Sundquist*, 2013 UT 45, ¶ 31 (citations and quotation marks omitted). That canon is inapplicable here because, as the U.S. Supreme Court has long recognized, Congress *did* alter the federal-state balance when it passed the NBA and related laws, and the regulatory scheme for national banks inherently contemplates a significant displacement of state regulatory authority.

In particular, the Court has explained that "States can exercise no control over [national banks], nor in any wise affect their operation, except in so far as Congress may see proper to permit." *Farmers' & Mechanics' Nat'l Bank v. Dearing*, 91 U.S. 29, 34 (1875). In other words, federal law shields national banks from "the hazard of unfriendly legislation by the States." *Tiffany v. National Bank*

of Missouri, 85 U.S. 409, 413 (1873). The Court has reiterated this point more recently, stating that "in the context of national bank legislation," "grants of both enumerated and incidental 'powers' to national banks" are "not normally limited by, but rather ordinarily pre-empt[], contrary state law." *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25, 32 (1996). Congress, that is, intended the NBA to supplant state law that would threaten uniformity in the regulation of national banks. *See Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 10-11 (2003) ("Uniform rules [regarding] ... national banks ... are an integral part of a banking system that needed protection from 'possible unfriendly State legislation.'"); *Easton v. Iowa*, 188 U.S. 220, 229 (1903) (federal law contemplates national banks that are "independent, so far as powers conferred are concerned, of state legislation which, if permitted to be applicable, might impose limitations and restrictions as various and as numerous as the states"). Against this backdrop, no further statement of congressional intent in section 92a was necessary. *See* U.S. *Sundquist* Br. 18.

Indeed, if there is any clear-statement rule in this context, it is the opposite of the one the Utah Supreme Court embraced. Because Congress "intended to facilitate ... a 'national banking system,'" the U.S. Supreme Court has explained, "[w]e would certainly be exceedingly reluctant to read ... a hiatus into the [federal banking laws] in the absence of evidence of specific congressional intent."

Marquette Nat'l Bank v. First of Omaha Serv. Corp., 439 U.S. 299, 314-315, 318 (1978). There is no such evidence in section 92a.

The second clear-statement canon invoked by the Utah Supreme Court similarly lends no support to the court's holding. That canon provides that "absent a clear ... indication of congressional intent to leave ... questions [of fundamental significance] up to agency discretion," a statute will be read to foreclose such a delegation. *Sundquist*, 2013 UT 45, ¶ 35. As the U.S. Supreme Court has observed, however, that canon applies only in "extraordinary cases," *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000), where "an agency's expansive construction of ... its own power would have wrought a fundamental change in the regulatory scheme," *City of Arlington v. FCC*, 133 S. Ct. 1863, 1872 (2013). That is not the situation here.

Section 92a(a) expressly "authorize[s]" the Comptroller "to grant [fiduciary powers] by special permit to national banks ..., when not in contravention of State or local law." The statute thus resolves the major policy question, allowing national banks to act as trustees or other fiduciaries by operation of federal law, subject to the limits of applicable state law. *See* U.S. *Sundquist* Br. 18-19. Although the statute does not resolve *which* state's law will apply to a national bank's conduct of its fiduciary duties, that is not a "major question[]" of policy, but

an "interstitial matter[]" that Congress presumably left to the agency to answer. *Brown & Williamson*, 529 U.S. at 159 (quotation marks omitted).

Seeking to avoid this conclusion, the Utah Supreme Court characterized the Comptroller's regulation as taking the "monumental" step of "authorizing one state to regulate non-judicial sales for the foreclosure of real property in another state." *Sundquist*, 2013 UT 45, ¶ 38. That description is inaccurate. The regulation (like section 92a itself) does not affect the application of substantive state law to national banks, including, with regard to the disposition of real property, the requirements of state foreclosure laws. *See Fiduciary Activities of National Banks*, 66 Fed. Reg. at 34,796 ("Section 9.7(e) does not affect the applicability of state substantive laws that govern the fiduciary relationship, such as the standard of care to be exercised by the fiduciary, or ability of a grantor to designate which state's laws govern the trust itself."). The regulation is concerned only with *authorizing* national banks to carry on fiduciary activities, and with preventing states from imposing authorization requirements beyond those imposed by the state in which the national bank is located. Contrary to *Sundquist*'s suggestion, a national bank located in Texas and performing fiduciary duties in Utah "is [still] subject to Utah requirements governing the conduct of the foreclosure, including, for example, requirements pertaining to the notice that must be provided to the borrower." OCC

Amicus Br., *Dutcher v. Matheson*, No. 12-4150, 2013 WL 3795800, at *9 (10th Cir. July 12, 2013).

The case the Utah Supreme Court principally relied on in discussing this second canon, *Brown & Williamson*, confirms that the "extraordinary" circumstances required to invoke the canon are not present here. *Brown & Williamson* concerned the authority of the FDA to regulate tobacco products against the backdrop of Congress having "created a distinct regulatory scheme for tobacco products, squarely rejected proposals to give the FDA jurisdiction over tobacco, and repeatedly acted to preclude any agency from exercising significant policy-making authority in the area." 529 U.S. at 159-160. Those steps informed the Court's determination that Congress had spoken to the precise question at issue. There is no sound basis to reach a similar conclusion here, as Congress has taken no similar steps to preclude agency policymaking with respect to fiduciary powers.

Finally, even if the canon applied, its clear-statement requirement would be satisfied. The question under the canon is simply whether Congress plainly delegated interpretive authority on a particular question to the agency. The answer here is yes: Congress designated the Comptroller as the official responsible for administering section 92a, and expressly vested him with full authority "to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted

therein." 12 U.S.C. § 92a(j); *see also id.* §92a(a), (k); *id.* § 93a. Identifying the state whose laws will govern the conduct of fiduciary duties is certainly necessary to administer and enforce compliance with the provisions of section 92a(a).

In sum—and as confirmed by the Tenth Circuit's contrary conclusion in *Dutcher*—the Utah Supreme Court gravely erred in holding that the term "located" in section 92a is unambiguous.

2. The Comptroller's regulation is a reasonable construction of the statute and therefore entitled to judicial deference

Sundquist also erred in deeming 12 C.F.R. § 9.7 "unreasonable—if not irrational," and hence not deserving of deference at *Chevron* step two. *Sundquist*, 2013 UT 45, ¶ 39.

As the U.S. Supreme Court has explained, an agency's interpretation of a statute need not be "the only reasonable one" in order to "garner[] the Court's respect under *Chevron*." *Astrue v. Capato ex rel. B.N.C.*, 566 U.S. 541, 545 (2012). Rather, courts must defer to any "permissible construction of the statute," even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 & n.11. The Court has also specifically addressed deference to the Comptroller, saying that "[t]he Comptroller ... is charged with the enforcement of the banking laws to an extent that warrants the invocation of [the rule of deference] with respect to his deliberative conclusions as to the meaning of these laws." *NationsBank of North*

Carolina, N.A. v. Variable Annuity Life Ins. Co., 513 U.S. 251, 256-257 (1995); *accord Clarke v. Securities Indus. Ass'n*, 479 U.S. 388, 403-404 (1987). Indeed, the Court has stated that it "cannot come lightly to the conclusion that the Comptroller has authorized activity that violates the banking laws." *Investment Co. Inst. v. Camp*, 401 U.S. 617, 626 (1971). That is particularly true here given that the Comptroller's interpretation is embodied in a "full-dress regulation ... adopted pursuant to the notice-and-comment procedures of the Administrative Procedure Act designed to assure due deliberation." *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996).

Under this precedent, the Comptroller's regulation easily warrants deference. Section 92a(a) enumerates a variety of fiduciary roles for national banks, including "trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver." It was manifestly reasonable for the Comptroller to define where a national bank is "located" by referring to activities that apply to all of these roles, rather than only some of them. That approach allows national banks to structure their various fiduciary activities in a way that subjects them to clear and consistent application of state law. *Cf. Fiduciary Activities of National Banks*, 61 Fed. Reg. 68,543, 68,545 (Dec. 30, 1996) (final OCC rule adopting definition of "fiduciary capacity" in 12 C.F.R. § 9.2: "The OCC

believes that 'fiduciary capacity' should be defined in a manner that fosters consistent application of part 9 throughout the national banking system.").

The Utah Supreme Court's decision, by contrast, would make the location of a national bank turn on the object of the particular fiduciary activity in which the bank is engaged (here, real property). "Because a single trust may contain property located in several different States," this "property-based rule could subject a national bank's conduct of a single fiduciary relationship to the laws of several different States—a result that could 'throw into confusion the complex system of modern interstate banking.'" U.S. *Sundquist* Br. 17 (quoting *Marquette*, 439 U.S. at 312). Under *Sundquist*'s approach, moreover, a bank's location would vary from activity to activity. Indeed, a national bank could be "located" in multiple states even when serving as trustee for one trustor, based on the particular activity the bank was conducting. Section 92a does not compel such a confusing and inefficient result. *Cf.* OCC Interpretive Letter No. 995, 2004 WL 3418856, at *2-3 (June 22, 2004) ("For each fiduciary relationship, a national bank will refer to only one state's laws for purposes of defining the extent of its fiduciary powers pursuant to Section 92a. The Bank would look to the laws of that state to determine which fiduciary capacities it may engage in, and may then engage in any of these capacities for customers both in that state and in other states.").

Section 9.7's construction of section 92a is further supported by the careful explanation the Comptroller provided in promulgating the regulation. The Comptroller considered the history of how "located" was added to section 92a, and determined from that history and the attendant context that the state in which the national bank is located must be the one in which the bank acts in a fiduciary capacity. *See Fiduciary Activities of National Banks*, 66 Fed. Reg. at 34,794 n.6. The Comptroller also considered U.S. Supreme Court precedent emphasizing that state laws cannot prohibit or restrict out-of-state national banks from performing their federally authorized fiduciary powers. *See id.* at 34,795 & n.7 (citing *Barnett Bank*, 517 U.S. 25). Moreover, as the Comptroller has explained, the regulation codifies three prior OCC interpretive letters, reflecting consistency with the agency's prior positions on these issues. *See id.* at 34,792 (stating that § 9.7 "reflected positions taken" in OCC Interpretive Letters 695, 866, and 872); *see also* U.S. *Sundquist* Br. 15.

The regulation is also consistent with U.S. Supreme Court precedent concerning other powers of a national bank. For example, construing another provision of the NBA that refers to the laws of the state in which a national bank is "located," 12 U.S.C. § 85, the Court approved the exportation of a national bank's interest-rate powers—and, as a result, the preemption of state usury laws. *Marquette*, 439 U.S. at 309-313. The Court held that a bank was "located" in, and

subject to the usury laws of, only the state in which it was chartered, even if it solicited residents of other states for credit cards to be used in transactions with merchants of other states. *Id.* Such an approach, the Court explained, furthers the purposes of the federal banking laws to create a "national banking system," whereas a contrary rule would sow uncertainty because a "national bank could never be certain whether its contacts with residents of foreign States were sufficient to alter its location." *Id.* at 312, 315. The Comptroller's adoption of a highly similar approach suggests that his regulation is, at the very least, a permissible construction of the statute.

The analysis that led the Utah Supreme Court to a contrary view is untenable. The court began by stating that "[i]f [section] 92a is to mean what it says (i.e., the plain meaning), the reference to 'State or local law' at a minimum should be construed to mean the State in which the trust activity occurs." *Sundquist*, 2013 UT 45, ¶ 41 (brackets in original). Nothing in the statute, however, suggests that "State or local law" must be "construed to mean the State in which the trust activity occurs." *Id.* Again, what the statute refers to is "the State in which the national bank is located." 12 U.S.C. § 92a(a). The Utah Supreme Court improperly put its preferred gloss on section 92a and then faulted the Comptroller for adopting a regulation inconsistent with that gloss. That was error because the court's gloss is in no way compelled by the statutory text.

To the extent *Sundquist* was based on a lack of explicit congressional authority for the Comptroller to preempt Utah law, the U.S. Supreme Court has made clear that that a banking "regulation's force does not depend on express congressional authorization to displace state law." *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 154 (1982). In any event, 12 C.F.R. § 9.7 is consistent with a presumption that Congress intended to minimize the displacement of state law. As the Comptroller explained, the regulation "does not mean that national banks may engage in fiduciary activities free from state-imposed restrictions. Rather, [it] simply identifies *which* state's laws will apply." OCC Interpretive Letter No. 866, 1999 WL 983923, at *5 (Oct. 8, 1999). Where a federal statute incorporates the law of one state, it is inevitable that conflicting law from any other state will be preempted.

In short, because the Comptroller's approach to defining "located" reasonably promotes clarity and consistency for national banks across the range of fiduciary activities expressly permitted by section 92a, and does not conflict with any language in the statute, the Utah Supreme Court erred in refusing to defer to his interpretation—an error significant enough for the Court to revisit it notwithstanding law of the case or stare decisis. Once that error is corrected, it is clear that ReconTrust was permitted to conduct the foreclosure sale because it was located in Texas and its fiduciary activities were limited only by Texas law.

II. EVEN IF RECONTRUST WERE "LOCATED" IN UTAH, IT WAS AUTHORIZED TO CONDUCT THE FORECLOSURE SALE UNDER SECTION 92a(b) BECAUSE UTAH LAW PERMITS COMPETITORS OF NATIONAL BANKS TO CONDUCT SUCH SALES

Even if *Sundquist* were correct that ReconTrust was "located" in Utah under section 92a, federal law still authorized ReconTrust to conduct the challenged foreclosure sale. As discussed, section 92a(a) authorizes the Comptroller to permit national banks to perform trust duties only so long such performance is not in contravention of state law. But section 92a(b) then limits the application of state laws that would disfavor national banks. It provides that:

> Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing [fiduciary] powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

12 U.S.C. § 92a(b). As the U.S. Supreme Court explained long ago (addressing the predecessor statute), this language "says in a roundabout and polite but unmistakable way that whatever may be the State law, national banks having the permit of the [Comptroller] may act as [trustees] if trust companies [or other corporations] competing with them have that power." *Missouri ex rel. Burnes Nat'l Bank v. Duncan*, 265 U.S. 17, 23 (1924).

This provision entitled ReconTrust to conduct the challenged foreclosure sale, because Utah law permits title-insurance companies to conduct non-judicial

foreclosure sales. Utah Code Ann. § 57-1-21(1)(a)(iv), (3); *id.* § 57-1-23. Under section 92a(b), therefore, ReconTrust may exercise the same power (assuming authorization from the Comptroller, of course) so long as title companies are "other corporations which compete with national banks." 12 U.S.C. § 92a(b). They are.

As an initial matter, it is not disputed that ReconTrust, as a national bank, is authorized under federal law to serve as a trustee under a deed of trust, including in Utah. Nor is it disputed that title insurance companies are authorized to act as trustees under Utah law. Utah Code Ann. § 57-1-21(1)(a)(iv). Thus, national banks and title companies compete for business as trustees under deeds of trust. More specifically, national banks like ReconTrust, which provide foreclosure-trustee services (and conduct foreclosure sales where permitted by law), are in direct competition with title-insurance companies in Utah that provide the same services. Hence, under section 92a(b), it "shall not be deemed to be in contravention" of Utah law for national banks to perform any of the fiduciary duties that Utah law permits title insurance companies to perform, and a national bank permitted by the Comptroller to act as a trustee may exercise any of those duties. *See Dutcher v. Matheson*, 2012 WL 423379, at *7 (D. Utah Feb. 8, 2012) ("Utah title companies compete with Recon[Trust] .... Accordingly, Recon[Trust] is entitled to the same privileges as a Utah title company."), *vacated on other grounds*, 733 F.3d 980, 990 (10th Cir. 2013).

The Utah Supreme Court rejected this argument in *Sundquist*, reasoning that "[a]s a national bank, ReconTrust competes with Utah banks" (which cannot exercise the power of sale), not with Utah attorneys or title insurance companies, and that "[i]t would be irrational to interpret § 92a(b) or § 9.7 as giving a national bank ... authority to exercise a power that Utah law specifically prohibits even Utah banks from exercising." 2013 UT 45, ¶¶ 48-49. But while national banks do compete with Utah banks, *Sundquist*'s premise that Utah banks are the *only* Utah entities with which national banks compete is infirm. Indeed, section 92a(b) expressly contemplates that national banks compete with entities other than state banks—"trust companies" and "other corporations"—and gives national banks the powers that state law grants both to state banks and to these other entities. Congress intended to level the playing field between national banks and *any* of their competitors, and thus to preempt state laws favoring those competitors.

Because Utah law grants competitors of national banks the power to conduct a foreclosure sale under a trust deed, section 92a entitled ReconTrust to do so as well.

CONCLUSION

The district court's judgment should be reversed, but *Sundquist* (though wrongly decided) requires this Court instead to affirm.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

According to the word-processing system used to prepare the foregoing brief (Microsoft Word), the brief contains 10,039 words, excluding the portions exempted by Utah Rule of Appellate Procedure 24(f)(1)(B).

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12 U.S.C. § 92a. Trust powers

(a) Authority of Comptroller of the Currency

The Comptroller of the Currency shall be authorized and empowered to grant by special permit to national banks applying therefor, when not in contravention of State or local law, the right to act as trustee, executor, administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or in any other fiduciary capacity in which State banks, trust companies, or other corporations which come into competition with national banks are permitted to act under the laws of the State in which the national bank is located.

(b) Grant and exercise of powers deemed not in contravention of State or local law

Whenever the laws of such State authorize or permit the exercise of any or all of the foregoing powers by State banks, trust companies, or other corporations which compete with national banks, the granting to and the exercise of such powers by national banks shall not be deemed to be in contravention of State or local law within the meaning of this section.

(c) Segregation of fiduciary and general assets; separate books and records; access of State banking authorities to reports of examinations, books, records, and assets

National banks exercising any or all of the powers enumerating[1] in this section shall segregate all assets held in any fiduciary capacity from the general assets of the bank and shall keep a separate set of books and records showing in proper detail all transactions engaged in under authority of this section. The State banking authorities may have access to reports of examination made by the Comptroller of the Currency insofar as such reports relate to the trust department of such bank, but nothing in this section shall be construed as authorizing the State banking authorities to examine the books, records, and assets of such bank.

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1 *So in original. Probably should be "enumerated".*

(d) Prohibited operations; separate investment account; collateral for certain funds used in conduct of business

No national bank shall receive in its trust department deposits of current funds subject to check or the deposit of checks, drafts, bills of exchange, or other items for collection or exchange purposes. Funds deposited or held in trust by the bank awaiting investment shall be carried in a separate account and shall not be used by the bank in the conduct of its business unless it shall first set aside in the trust department United States bonds or other securities approved by the Comptroller of the Currency.

(e) Lien and claim upon bank failure

In the event of the failure of such bank the owners of the funds held in trust for investment shall have a lien on the bonds or other securities so set apart in addition to their claim against the estate of the bank.

(f) Deposits of securities for protection of private or court trusts; execution of and exemption from bond

Whenever the laws of a State require corporations acting in a fiduciary capacity to deposit securities with the State authorities for the protection of private or court trusts, national banks so acting shall be required to make similar deposits and securities so deposited shall be held for the protection of private or court trusts, as provided by the State law. National banks in such cases shall not be required to execute the bond usually required of individuals if State corporations under similar circumstances are exempt from this requirement. National banks shall have power to execute such bond when so required by the laws of the State.

(g) Officials' oath or affidavit

In any case in which the laws of a State require that a corporation acting as trustee, executor, administrator, or in any capacity specified in this section, shall take an oath or make an affidavit, the president, vice president, cashier, or trust officer of such national bank may take the necessary oath or execute the necessary affidavit.

(h) Loans of trust funds to officers and employees prohibited; penalties

It shall be unlawful for any national banking association to lend any officer, director, or employee any funds held in trust under the powers conferred by this

section. Any officer, director, or employee making such loan, or to whom such loan is made, may be fined not more than $5,000, or imprisoned not more than five years, or may be both fined and imprisoned, in the discretion of the court.

(i) Considerations determinative of grant or denial of applications; minimum capital and surplus for issuance of permit

In passing upon applications for permission to exercise the powers enumerated in this section, the Comptroller of the Currency may take into consideration the amount of capital and surplus of the applying bank, whether or not such capital and surplus is sufficient under the circumstances of the case, the needs of the community to be served, and any other facts and circumstances that seem to him proper, and may grant or refuse the application accordingly: Provided, That no permit shall be issued to any national banking association having a capital and surplus less than the capital and surplus required by State law of State banks, trust companies, and corporations exercising such powers.

(j) Surrender of authorization; board resolution; Comptroller certification; activities affected; regulations

Any national banking association desiring to surrender its right to exercise the powers granted under this section, in order to relieve itself of the necessity of complying with the requirements of this section, or to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, or for any other purpose, may file with the Comptroller of the Currency a certified copy of a resolution of its board of directors signifying such desire. Upon receipt of such resolution, the Comptroller of the Currency, after satisfying himself that such bank has been relieved in accordance with State law of all duties as trustee, executory,[2] administrator, registrar of stocks and bonds, guardian of estates, assignee, receiver, or other fiduciary, under court, private, or other appointments previously accepted under authority of this section, may, in his discretion, issue to such bank a certificate certifying that such bank is no longer authorized to exercise the powers granted by this section. Upon the issuance of such a certificate by the Comptroller of the Currency, such bank (1) shall no longer be subject to the provisions of this section or the regulations of the Comptroller of the Currency made pursuant thereto, (2) shall be entitled to have returned to it any securities which it may have deposited with the State authorities for the protection of private or court trusts, and (3) shall not exercise thereafter any of the powers

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2 *So in original. Probably should be "executor,".*

granted by this section without first applying for and obtaining a new permit to exercise such powers pursuant to the provisions of this section. The Comptroller of the Currency is authorized and empowered to promulgate such regulations as he may deem necessary to enforce compliance with the provisions of this section and the proper exercise of the powers granted therein.

(k) Revocation; procedures applicable

(1) In addition to the authority conferred by other law, if, in the opinion of the Comptroller of the Currency, a national banking association is unlawfully or unsoundly exercising, or has unlawfully or unsoundly exercised, or has failed for a period of five consecutive years to exercise, the powers granted by this section or otherwise fails or has failed to comply with the requirements of this section, the Comptroller may issue and serve upon the association a notice of intent to revoke the authority of the association to exercise the powers granted by this section. The notice shall contain a statement of the facts constituting the alleged unlawful or unsound exercise of powers, or failure to exercise powers, or failure to comply, and shall fix a time and place at which a hearing will be held to determine whether an order revoking authority to exercise such powers should issue against the association.

(2) Such hearing shall be conducted in accordance with the provisions of section 1818(h) of this title, and subject to judicial review as provided in such section, and shall be fixed for a date not earlier than thirty days nor later than sixty days after service of such notice unless an earlier or later date is set by the Comptroller at the request of any association so served.

(3) Unless the association so served shall appear at the hearing by a duly authorized representative, it shall be deemed to have consented to the issuance of the revocation order. In the event of such consent, or if upon the record made at any such hearing, the Comptroller shall find that any allegation specified in the notice of charges has been established, the Comptroller may issue and serve upon the association an order prohibiting it from accepting any new or additional trust accounts and revoking authority to exercise any and all powers granted by this section, except that such order shall permit the association to continue to service all previously accepted trust accounts pending their expeditious divestiture or termination.

(4) A revocation order shall become effective not earlier than the expiration of thirty days after service of such order upon the association so served (except in

the case of a revocation order issued upon consent, which shall become effective at the time specified therein), and shall remain effective and enforceable, except to such extent as it is stayed, modified, terminated, or set aside by action of the Comptroller or a reviewing court.

12 C.F.R. § 9.7 Multi-state fiduciary operations.

(a) *Acting in a fiduciary capacity in more than one state.* Pursuant to 12 U.S.C. 92a and this section, a national bank may act in a fiduciary capacity in any state. If a national bank acts, or proposes to act, in a fiduciary capacity in a particular state, the bank may act in the following specific capacities:

(1) Any of the eight fiduciary capacities expressly listed in 12 U.S.C. 92a(a), unless the state prohibits its own state banks, trust companies, and other corporations that compete with national banks in that state from acting in that capacity; and

(2) Any other fiduciary capacity the state permits for its own state banks, trust companies, or other corporations that compete with national banks in that state.

(b) *Serving customers in other states.* While acting in a fiduciary capacity in one state, a national bank may market its fiduciary services to, and act as fiduciary for, customers located in any state, and it may act as fiduciary for relationships that include property located in other states. The bank may use a trust representative office for this purpose.

(c) *Offices in more than one state.* A national bank with fiduciary powers may establish trust offices or trust representative offices in any state.

(d) *Determination of the state referred to in 12 U.S.C. 92a.* For each fiduciary relationship, the state referred to in section 92a is the state in which the bank acts in a fiduciary capacity for that relationship. A national bank acts in a fiduciary capacity in the state in which it accepts the fiduciary appointment, executes the documents that create the fiduciary relationship, and makes discretionary decisions regarding the investment or distribution of fiduciary assets. If these activities take place in more than one state, then the state in which the bank

acts in a fiduciary capacity for section 92a purposes is the state that the bank designates from among those states.

(e) *Application of state law*—(1) *State laws used in section 92a.* The state laws that apply to a national bank's fiduciary activities by virtue of 12 U.S.C. 92a are the laws of the state in which the bank acts in a fiduciary capacity.

(2) *Other state laws.* Except for the state laws made applicable to national banks by virtue of 12 U.S.C. 92a, state laws limiting or establishing preconditions on the exercise of fiduciary powers are not applicable to national banks.

Utah Code § 57-1-21. Trustees of trust deeds—Qualifications.

(1) (a) The trustee of a trust deed shall be:

(i) any active member of the Utah State Bar who maintains a place within the state where the trustor or other interested parties may meet with the trustee to:

(A) request information about what is required to reinstate or payoff the obligation secured by the trust deed;

(B) deliver written communications to the lender as required by both the trust deed and by law;

(C) deliver funds to reinstate or payoff the loan secured by the trust deed; or

(D) deliver funds by a bidder at a foreclosure sale to pay for the purchase of the property secured by the trust deed;

(ii) any depository institution as defined in Section 7-1-103, or insurance company authorized to do business and actually doing business in Utah under the laws of Utah or the United States;

(iii) any corporation authorized to conduct a trust business and actually conducting a trust business in Utah under the laws of Utah or the United States;

(iv) any title insurance company or agency that:

(A) holds a certificate of authority or license under Title 31A, Insurance Code, to conduct insurance business in the state;

(B) is actually doing business in the state; and

(C) maintains a bona fide office in the state;

(v) any agency of the United States government; or

(vi) any association or corporation that is licensed, chartered, or regulated by the Farm Credit Administration or its successor.

(b) For purposes of this Subsection (1), a person maintains a bona fide office within the state if that person maintains a physical office in the state:

(i) that is open to the public;

(ii) that is staffed during regular business hours on regular business days; and

(iii) at which a trustor of a trust deed may in person:

(A) request information regarding a trust deed; or

(B) deliver funds, including reinstatement or payoff funds.

(c) This Subsection (1) is not applicable to a trustee of a trust deed existing prior to May 14, 1963, nor to any agreement that is supplemental to that trust deed.

(d) The amendments in Laws of Utah 2002, Chapter 209, to this Subsection (1) apply only to a trustee that is appointed on or after May 6, 2002.

(2) The trustee of a trust deed may not be the beneficiary of the trust deed, unless the beneficiary is qualified to be a trustee under Subsection (1)(a)(ii), (iii), (v), or (vi).

(3) The power of sale conferred by Section 57-1-23 may only be exercised by the trustee of a trust deed if the trustee is qualified under Subsection (1)(a)(i) or (iv).

(4) A trust deed with an unqualified trustee or without a trustee shall be effective to create a lien on the trust property, but the power of sale and other trustee powers under the trust deed may be exercised only if the beneficiary has appointed a qualified successor trustee under Section 57-1-22.

Utah Code § 57-1-23. Sale of trust property—Power of trustee—Foreclosure of trust deed.

The trustee who is qualified under Subsection 57-1-21(1)(a)(i) or (iv) is given the power of sale by which the trustee may exercise and cause the trust property to be sold in the manner provided in Sections 57-1-24 and 57-1-27, after a breach of an obligation for which the trust property is conveyed as security; or, at the option of the beneficiary, a trust deed may be foreclosed in the manner provided by law for the foreclosure of mortgages on real property. The power of sale may be exercised by the trustee without express provision for it in the trust deed.